

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SANDRA M. GARCIA)	
Claimant)	
)	
VS.)	Docket No. 1,057,729
)	
BUCKLEY INDUSTRIES, INC.)	
Respondent)	
)	
AND)	
)	
ACCIDENT FUND NATIONAL INS.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the December 7, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Elaine Fleetwood of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 6, 2011, preliminary hearing and exhibit thereto, and all pleadings contained in the administrative file.¹

ISSUES

On September 20, 2011, claimant filed an Application for Hearing alleging that on or before May 23, 2010, and all dates thereafter she suffered pimples, which occurred first under her armpits and then spread, which developed into methicillin-resistant

¹ In claimant's brief filed with the Board on December 28, 2011, claimant listed her November 22, 2011, deposition as evidence. At the preliminary hearing, the ALJ was not asked to consider claimant's deposition as part of the record. Nor does the ALJ's preliminary hearing Order refer to the deposition. On November 16, 2011, respondent's counsel filed with the Division of Workers Compensation an Amended Notice to Take Discovery Deposition. The deposition transcript is entitled "Discovery Deposition." Therefore, this Board Member did not consider claimant's deposition of November 22, 2011, part of the record.

Staphylococcus aureus (MRSA). The cause of the injury and/or illness was alleged as working with fiberglass in an unsanitary environment, which resulted in the development of infection. Claimant alleged that she got tiny cuts at work and MRSA bacteria entered her body through the cuts. Claimant sought payment of past medical expenses, including medical mileage. In her brief to the Board claimant raised, as her only issue, whether she sustained a personal injury and/or occupational disease arising out of and in the course of her employment with respondent. The ALJ determined claimant failed to sustain her burden of proof of personal injury by accident arising out of and in the course of her employment with respondent, but the ALJ's Order was silent as to whether claimant had suffered a work-related occupational disease.

Claimant, in her Application for Review, appealed the ALJ's decision that claimant failed to sustain her burden of proving personal injury by accident arising out of and in the course of her employment with respondent. However, in her brief to the Board, claimant asserts the ALJ erred by failing to find that claimant suffered a personal injury and/or occupational disease arising out of and in the course of her employment with respondent. Respondent asserts the Board does not have jurisdiction to review the occupational disease issue as claimant failed to claim an occupational disease at the preliminary hearing. If the Board concludes it has jurisdiction, respondent submits claimant has not proven she sustained an occupational disease. Respondent asks the Board to affirm the ALJ's finding that claimant did not sustain her burden of proving she suffered a personal injury by accident arising out of and in the course of her employment with respondent. Respondent also argues that claimant must prove with credible evidence that she contracted MRSA arising out of and in the course of her employment, and she failed to do so.

1. Did claimant sustain a personal injury by accident arising out of and in the course of her employment with respondent?

2. At the preliminary hearing, did claimant claim in the alternative that she contracted an occupational disease arising out of and in the course of her employment with respondent?

3. If so, did claimant contract an occupational disease arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

At the preliminary hearing, the ALJ spent some time framing the issues and determining the nature of the claim. Claimant's attorney did not allege that claimant contracted a work-related occupational disease. Rather, she asserted claimant suffered

cuts at work and as a result contracted MRSA. The following two exchanges between the ALJ and claimant's counsel are of consequence:

THE COURT: Okay. So what was the date of injury?

MS. FLEETWOOD: We have dates leading up to May 23, 2010, and thereafter.²

....

THE COURT: Well, with the MRSA, but what I'm trying to understand, is there any medical condition that was a work-related injury? I mean, usually isn't MRSA an infection? So it would have to come from somewhere, so was there any tie up of a work-related injury at all?

MS. FLEETWOOD: The type of work she does, she works with Fiberglas, so she gets tiny cuts on her body. She has a couple right now, one in her arm and one here, and MRSA is a bacteria, and she believes entered through the cuts that she has from the work environment.³

Claimant began working for respondent in 2000. One of her job duties was using a machine that cuts fiberglass, which requires her to physically handle the fiberglass. Claimant testified that handling fiberglass makes her break out with little spots. Claimant testified that around May 2010, she noticed a "pimple like thing"⁴ under her left arm. Because the pimple got bigger, she arranged to see her physician. However, before claimant could see her physician, the pimple burst. By the time claimant went to a doctor at GraceMed Clinic on June 16, 2010, the pimple had healed, so the doctor could not do anything for her.

In June 2010, while in the restroom at work, claimant noticed another pimple on her left inner thigh, but did not think anything of it. "Working with Fiberglas, the heat, I just thought it was a heat rash or something, you know."⁵ She then developed another pimple under her right arm, which became worse. Claimant made an appointment to see a doctor. Because of the biting and burning, claimant went to the emergency room at Via Christi on June 28, 2010, before she saw the doctor.

The staff at Via Christi initially told claimant she had a staphylococcus infection. Tests determined claimant had contracted MRSA, a form of staphylococci that is resistant

² P.H. Trans. at 5.

³ *Id.*, at 6.

⁴ *Id.*, at 8.

⁵ *Id.*, at 10.

to many commonly used antibiotics. The pimples were lanced and drained at Via Christi and claimant was released the same day. Claimant was also prescribed several medications. After being released by Via Christi, claimant received treatment from GraceMed Clinic, Midwest Center for Wound Healing and Wesley Medical Center. Claimant was off work from June 28, 2010, to August 16, 2010.

Claimant was of the opinion she contracted MRSA at work. Before claimant contracted MRSA, she had a poor immune system. When asked why she specifically thought she contracted MRSA while working for respondent, claimant attributed her MRSA to the restrooms at work. She testified that MRSA enters the body through a cut and then forms a pimple when it starts. She indicated the bathrooms were disgusting and there was often no toilet paper or paper towels. Without paper towels workers would use toilet paper to dry their hands or not wash their hands at all. Employees who would not wash their hands could then touch water fountains, microwaves and other objects at work. Claimant implied that she contracted MRSA from an object previously touched by a fellow employee who carried MRSA.

Upon cross-examination, claimant admitted telling personnel at Midwest Center for Wound Healing on July 2, 2010, that she had no idea how she would have been exposed to MRSA. Claimant indicated that when she made that statement she was in pain and confused. When an employee injury report was completed for the insurance carrier on August 17, 2010, it did not indicate that claimant contracted MRSA at work. Claimant did not know if anyone else where she worked had contracted MRSA. She also acknowledged that no doctor directly related her MRSA to her employment with respondent.

Claimant's daughter, Paige M. Rakestraw, testified at the preliminary hearing that she accompanied claimant to GraceMed on June 16, 2010. She heard her mother tell the doctor about the dirty bathrooms at work. Ms. Rakestraw testified that she completed the injury report for claimant, because claimant was not physically able to do so. She testified that her mother believed she contracted MRSA at work and claimant described to her the filthy condition of the bathrooms at work.

Other than listing the date of the hearing and the appearances, the ALJ's December 7, 2011, Order stated only the following:

Claimant's preliminary hearing requests for payment of outstanding medical expenses are considered and denied. Claimant has failed to sustain her burden of proof of personal injury by accident arising out of and in the course of her employment with Respondent.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's

right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his or her right to an award for compensation by proving all the various conditions on which his or her right to a recovery depends. This must be established by a preponderance of the credible evidence.⁶

K.S.A. 44-5a01(b) states:

(b) "Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases: *Provided*, That compensation shall not be payable for pulmonary emphysema or other types of emphysema unless it is proved, by clear and convincing medical evidence to a reasonable probability, that such emphysema was caused, solely and independently of all other causes, by the employment with the employer against whom the claim is made, except that, if it is proved to a reasonable medical probability that an existing emphysema was aggravated and contributed to by the employment with the employer against whom the claim is made, compensation shall be payable for the resulting condition of the workman, but only to the extent such condition was so contributed to and aggravated by the employment.

In *Hall*,⁷ the claimant asserted he suffered either an accident or an occupational disease arising out of and in the course of his employment with the respondent. Hall was

⁶ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

⁷ *Hall v. Martin Logan, Ltd.*, No. 1,021,353, 2008 WL 5484141 (Kan. WCAB Dec. 17, 2008).

exposed to urethane fumes, odors, gases, dust and chemicals at work. As a result, Hall developed bronchitis and gastroesophageal reflux disease. The Board in *Hall* stated:

Here, claimant's injury is a hybrid of occupational disease and a series of accidents. The Board finds that claimant's exposure to paint fumes, dust from sanding, and other irritants at work caused repetitive traumas and injuries to claimant's airways, bronchial passages, and lungs and should be compensated as a series of accidents and injuries. The Board otherwise adopts the findings, conclusions and orders of the ALJ as its own.

In *Shi*,⁸ the claimant was a researcher who contended she contracted hepatitis B when she handled human placentas. The primary issue was whether she contracted an occupational disease arising out of and in the course of her employment with respondent. Shi testified she handled the human placenta without protective gloves and the human placentas were not tested for hepatitis B. At the preliminary hearing, Shi's theory on how she contracted hepatitis B was different. Shi testified she contracted hepatitis B when she stuck herself with a needle while working with monkey brain cells. The Board concluded that claimant failed to identify a specific incident where she came into contact with infected blood or tissue and denied the claim.

By statute the preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁰

ANALYSIS

Claimant's Application for Review raised as an issue the ALJ's decision that claimant failed to sustain her burden of proof of personal injury by accident arising out of and in the course of her employment with respondent. In her brief, claimant stated the only issue on appeal was whether the workplace injury and/or occupational disease alleged by her arose out of and in the course of her employment. At the preliminary hearing, claimant's counsel told the ALJ that claimant had suffered an injury. However, claimant testified that she contracted MRSA at work. *Hall* and similar cases allow a claimant to allege an accidental injury or, in the alternative, an occupational disease. Additionally, the Application for Hearing filed by claimant did not require claimant to specify whether she

⁸ *Shi v. State of Kansas*, No. 213,957, 2001 WL 403291 (Kan. WCAB Mar. 29, 2001), *aff'd*, No. 87,077 (Kansas Court of Appeals unpublished opinion filed January 11, 2002).

⁹ K.S.A. 44-534a.

¹⁰ K.S.A. 2010 Supp. 44-555c(k).

suffered an accidental injury or occupational disease. Therefore, this Board Member finds that claimant claimed she sustained an occupational disease arising out of and in the course of her employment.

The Board has limited authority and jurisdiction when reviewing findings from preliminary hearing orders. The disputed issue must be one of those specifically set forth in K.S.A. 44-534a or the ALJ must have exceeded his or her jurisdiction as required by K.S.A. 2010 Supp. 44-551. The jurisdictional issues listed in K.S.A. 44-534a are: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; or (4) whether certain defenses apply. Although not specifically mentioned in the statute, this Board Member concludes the Board has jurisdiction to review whether claimant contracted an occupational disease arising out of and in the course of her employment with respondent.

Claimant's allegation that she suffered work-related cuts, which became infected with MRSA, is a claim for accidental injury, not a claim for an occupational disease. In *Casey*,¹¹ after working for respondent for six years, Casey began having severe allergic reactions to fresh fruit and other items sold at respondent's place of business. However, she also developed allergies to molds, trees, grasses, weeds and animal dander. Casey's physician testified that Casey was having an anaphylactic reaction while working for the respondent. The Kansas Court of Appeals held Casey did not have an occupational disease, but rather suffered a work-related injury. The Kansas appellate courts have made a similar distinction between occupational disease and accidental injury in other cases.¹² Claimant asserts the triggering factor in contracting MRSA is the cuts she suffered at work. After considering the facts of this claim, this Board Member finds that claimant's claim is one for an accidental injury, not an occupational disease.

Claimant testified that she noticed three "pimples" – one under her left arm, another under her right arm, and a third on her left inner thigh. Claimant never indicated any of these were the areas where she was cut, which then got infected. Claimant did not identify the part of her body which was cut by the fiberglass or the number of cuts. Even if the three pimples started out as a cut, claimant provided no explanation as to how handling the fiberglass at work caused cuts under her arms and to her left inner thigh.

Claimant's explanation as to how she contracted MRSA is not supported by a preponderance of the evidence. Her explanation is that there were no paper towels in the bathrooms at work. She implied another employee who had the MRSA virus failed to wash

¹¹ *Casey v. Dillon Companies, Inc.*, 34 Kan. App. 2d 66, 114 P.3d 182, *rev. denied* 280 Kan. 981 (2005).

¹² *Martin v. Cudahy Foods Co.*, 231 Kan. 397, 646 P.2d 468 (1982); *Baldwin v. Jensen-Salsbery Laboratories*, 10 Kan. App. 2d 673, 708 P.2d 556 (1985), *rev. denied* 238 Kan. 877 (1986).

his or her hands and touched an object such as the drinking fountain or microwave. Claimant inferred that, in turn, she touched that item and infected one of her cuts. This version of events is mere speculation. Nor do the medical records provide competent substantial evidence to support claimant's theory as to how she contracted MRSA. Simply put, claimant failed to prove by a preponderance of the evidence that she suffered a personal injury by accident arising out of and in the course of her employment with respondent.

This Board Member finds there is insufficient evidence to support claimant's alternative theory that she suffered a work-related occupational disease. Claimant alleges she received cuts at work and, as a result, contracted MRSA at work through one of the cuts. However, like the employee in *Shi*, claimant did not identify a specific incident when she came in contact with MRSA or that the cuts made her more susceptible to MRSA.

K.S.A. 44-5a01(b) provides that ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases. MRSA is an ordinary disease of life to which the general public may be exposed. Nor is there any special risk of contracting MRSA connected with claimant's job. Claimant also failed to prove by a preponderance of the evidence that she contracted MRSA through the cuts she allegedly suffered at work. Claimant also failed to prove by a preponderance of the evidence that she contracted MRSA at work.

CONCLUSION

1. Claimant failed to prove by a preponderance of the evidence that she sustained a personal injury by accident arising out of and in the course of her employment with respondent.

2. At the preliminary hearing, claimant in the alternative claimed that she contracted an occupational disease arising out of and in the course of her employment with respondent.

3. Claimant failed to prove by a preponderance of the evidence that she contracted an occupational disease arising out of and in the course of her employment with respondent.

WHEREFORE, the undersigned Board Member affirms the December 7, 2011, preliminary hearing Order entered by ALJ Barnes.

IT IS SO ORDERED.

Dated this ____ day of March, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Elaine Fleetwood, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge